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Docket No.

In the Supreme Court of the United States

October Term, 1983

PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

SAMUEL R. PIERCE, JR.,
SECRETARY OF HOUSING AND URBAN DEVELOPMENT, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Gordon B. Tayloe, Jr.
Ralph W. Buxton
COOPER, DAVIS, KILGORE, PARKER,
LEON & FENNELL, P.C.
500 Central Fidelity Bank Building
Portsmouth, Virginia 23704
Phone No. (804) 397-3481
Counsel for Petitioner

QUESTION PRESENTED

Whether the "sue and be sued" clause in 42 U.S.C. §1404(a), a waiver of immunity, coupled with federal question issues involving federal constitutional, statutory and common law, grant jurisdiction pursuant to 28 U.S.C. §1331 to the District Court to determine by declaratory judgment and injunctive relief whether the Secretary of the United States Department of Housing and Urban Development erroneously applied Section 211(a) of the Housing and Community Development Amendments of 1979 to: (1) the existing Annual Contributions Contract entered into in 1976 between the United States Department of Housing and Urban Development and the Portsmouth Redevelopment and Housing

Authority pursuant to the United States Housing Act of 1937, 42 U.S.C. §1437 et seq; and (2) the application of the Portsmouth Redevelopment and Housing Authority for Comprehensive Improvement Assistance Program funds pursuant to 42 U.S.C. §1437l.

THE PARTIES TO THE PROCEEDING BELOW

Philip Abrams, Assistant Secretary for Housing, United States Department of Housing and Urban Development, and I. Margaret White, Area Manager of the Richmond, Virginia Area Office of the United States Department of Housing and Urban Development, were also parties below represented by the United States Department of Justice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

MISCELLANEOUS

No.

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OCTOBER TERM, 1983

PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

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SAMUEL R. PIERCE, JR., Secretary of Housing and Urban Development, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Portsmouth Redevelopment and Housing Authority, prays that a Writ of Certiorari issue to review the

opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on April 27, 1983, and the denial of Portsmouth Redevelopment and Housing Authority's petition for rehearing *in banc*, dated June 20, 1983. A stay was granted pursuant to Rule 41(b) F.R.A.P. on June 20, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears in Appendix A. The opinion of the United States District Court for the Eastern District of Virginia, also as yet unreported, appears in Appendix B.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was rendered on April 27, 1983. Portsmouth Redevelopment and Housing Authority's "Motion for Rehearing In Banc" was denied on June 20, 1983. This Petition for a Writ of Certiorari was filed within 30 days of the granting of the Portsmouth Redevelopment and Housing Authority's "Alternative Motion to Stay the Mandate of the Court Pending Application for Writ of Certiorari to the Supreme Court" pursuant to Rule 41(b), F.R.A.P. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Federal Question, 28 U.S.C. §1331 (set out in Appendix C-1).

Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491(a) (set out in Appendix C-1 to C-4).

Housing Act of 1948, 42 U.S.C. §1404a (set out in Appendix C-5 to C-6).

The U.S. Housing Act of 1937, 42 U.S.C. §1437 et seq. (only §1437g set out in Appendix C-6 to C-10).

STATEMENT OF FACTS

Portsmouth Redevelopment and Housing Authority (Authority) is a political subdivision of the Commonwealth of Virginia created under Title 36 of the 1950 Code of Virginia, as amended. The Authority operates 2,356 public housing units for low-income persons in Portsmouth, Virginia. It receives several types of federal subsidies pursuant to an Annual

Contributions Contract (ACC) with the United States Department of Housing and Urban Development (HUD) and the provisions of the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437n (the "Act"). Additional annual contributions for operating expenses (operating subsidies) are made available to the Authority in accordance with the terms of its ACC and 42 U.S.C. §1437g (Appendix C-6 to C-10). In 1976, when the Authority and HUD entered into the ACC, §1437g provided, in part: "The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds." In 1979, Congress, pursuant to Section 211(a) of the Housing and Community

Development Amendments of 1979 (Section 211(a)), amended 42 U.S.C. 1437g by adding the following clause to the sentence quoted: "and such contract shall provide that no disposition of the low-income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary." Pub. L. No. 96-153, §211(a)(3), 93 Stat. 1110, 42 U.S.C. §1437g(a)(1) (1979) (Appendix C-7). Subsequent to the enactment of Section 211(a), the Secretary of HUD (Secretary) promulgated a regulation which unilaterally directed each public housing authority with an existing ACC to execute an amendment thereto

requiring the authority to operate its projects as low income housing for a period of ten years after operating subsidies cease. See 24 C.F.R. §869.105(a) (1980) (Appendix C-10).

The Authority refused to execute an amendment to its ACC contending: (1) Section 211(a) did not apply to existing ACC's; (2) 24 C.F.R. §869.105(a) had no statutory basis and thus was illegal and unenforceable because it required operation of the projects as low income housing whereas Section 211(a) only prohibited disposition of the projects; and (3) the enforcement of 24 C.F.R. §869.105(a) was an unconstitutional taking of a property interest (contract rights) without due process. The Authority could not operate its projects

as low income housing now without the operating subsidies, and it would not be able to do so for ten years after operating subsidies cease.

As a result of the Authority's refusal to amend its ACC, HUD began withholding operating subsidies. In addition, HUD declined to consider the Authority's application for funds under the Comprehensive Improvement Assistance Program (CIAP), 42 U.S.C. §1437l. The parties have stipulated that the CIAP application would have been approved were it not for the Authority's refusal to execute the amendment.

The Authority filed an Amended Complaint seeking the U. S. District Court to: (1) Declare Section 211(a) not applicable to the existing ACC

between the Authority and HUD; (2) declare 24 C.F.R. §869.105(a) invalid as having no statutory basis; (3) declare Section 211(a) cannot be applied as a condition to the approval of the Authority's CIAP application; (4) direct an accounting of sums owed by the Secretary to the Authority as a result of the erroneous interpretation of Section 211(a); and (5) order such injunctive relief as was necessary to affectuate its declaratory judgments.

The Secretary filed a motion to dismiss for lack of jurisdiction, alleging that the action was essentially a contract claim against the United States for an amount exceeding $10,000 and jurisdiction therefore belonged exclusively to the United States Claims

Court under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491. The district court denied HUD's motion, ruling that the case was not ex contractu against the United States. The district court ruled that 42 U.S.C. §1404(a) waived sovereign immunity, and 28 U.S.C. §1331 granted federal question jurisdiction in that federal constitutional, statutory and common law questions were raised by the Amended Motion for Judgment. The district court decided the merits of the case in the Authority's favor and issued the requested declaratory and injunctive relief.

The Circuit Court of Appeals for the Fourth Circuit vacated the district court's order ruling the gravament of the Authority's claim was ex contractu

against the United States; the claim was for more than $10,000 and that the United States Claims Court had exclusive jurisdiction. It is for a review of that opinion that the Authority seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED A FEDERAL JURISDICTIONAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) The Court of Appeals below overlooked or ignored Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381 (1939); Federal Housing Administration v. Burr, 309 U.S. 242 (1940); and Reconstruction Finance Corporation v. J. G. Menihan, 312 U.S. 81 (1941)

and, as a consequence, its holding is in conflict with said decisions. The Court of Appeals' ruling that a governmental agency is the United States, the sovereign, and thus the Tucker Act is the only applicable waiver of immunity is contrary to these decisions. The cited cases of this Court hold that the transactions of governmental agencies "are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." Menihan, supra, at p. 83. The United States Housing Authority was specifically listed as such a federal agency with a "sue and be sued" clause in footnote 3 beginning on page 390 of Keifer, supra. The functions, powers and duties of the

United States Housing Authority have been transferred by statute to the Secretary. 42 U.S.C. §3534.

The above cited cases of this Court also stand for the proposition that a waiver of governmental immunity should be liberally construed and not restricted unless specifically stated by Congress. In Keifer, supra, at pp. 395 and 396, this Court said:

> . . . In the light of these statutes it ought not to be assumed that when Congress consented 'to suit' without qualification, the effect is the same as though it had written 'in suits on contract, express or implied, in cases not sounding in tort.' No such distinction was made by Congress. . . . There is equally no warrant for importing such a distinction here. To do so would make application of a steadily growing policy of governmental liability contingent upon irrelevant procedural factors. These, in

> our law, are still deeply rooted in historical accidents to which the expanding conceptions of public morality regarding governmental responsibility should not be subordinated.

The Court of Appeals' decision that the Secretary is the sovereign United States and that the failure to include the words "in any court of competent jurisdiction, State or Federal" in §1404a denied this "sue and be sued" clause the power to grant subject matter jurisdiction placed a restriction on §1404a without showing that such a restriction is consistent with the statutory or constitutional scheme, that the restriction is necessary to avoid grave interference with the performance of a governmental function or that it

was plainly the purpose of Congress to use §1404a in such a narrow sense.

In Ferguson v. Union National Bank of Clarksburg, West Virginia, 126 F.2d 753 (4th Cir. 1942), the Court of Appeals relied upon Keifer, Burr and Menihan, supra, in holding "the jurisdiction of a United States District Court to entertain a suit against governmental agencies and corporations is not limited by the provisions of the Tucker Act. . . ." (citations omitted). Ferguson, supra, at pp. 756 and 757. In fact, the result in Ferguson was that the "sue and be sued" clause therein involved, by itself, granted subject matter jurisdiction to the district court.

The holding of the Court of Appeals that the source of the funds requires the exclusive jurisdiction of the United States Claims Court under the Tucker Act is also in conflict with the Burr case. It does not matter that the "origin" of the funds was the public treasury as long as these funds have been set aside for the Secretary and are now in his control. The Court in Burr, supra, at p. 250, said:

> The result is that only those funds which have been paid over to the Federal Housing Administration in accordance with §1 and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution.

Clearly, Burr recognized that the origin of the funds would be the Treasury, but Burr was concerned with

control of the funds, not the source. The operating subsidies and CIAP funds involved here are within the control of the Secretary. The Authority will not have to execute against the Treasury to obtain the funds. The Temporary Restraining Order, the Preliminary Injunction and the Order (Appendix B-48) of the District Court required the Secretary to retain control of the funds and to hold same in reserve subject to further orders of the District Court.

We know the Secretary has control of the funds because the Secretary has been paying operating subsidies to the Authority since and pursuant to the District Court's Order of November 29, 1982, and the Secretary has entered into a contract with the Authority for CIAP

funds. No execution against the Treasury was necessary for the Authority to obtain the funds.

The decision of the Court of Appeals cites the Appropriations Act, Pub. L. No. 97-101, 95 STAT. 1417, (Appendix A-11). This act provided the funds for the Secretary's programs and operations for the fiscal year ending September 30, 1982. Apparently, the Court of Appeals used this citation to show that the source of the funds was the Treasury and that "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." See Sec. 404, 95 STAT 1436. However, the Court of Appeals overlooked Appropriations

Act, Pub. L. No. 97-272, 96 STAT. 1160, which provided the Secretary's funds for fiscal year ending September 30, 1983. In the paragraph entitled, "Payments for Operation of Low-Income Housing Projects," under Title I of the Act on page 2 (96 STAT. 1161) is found the following:

> . . . Provided further, That funds heretofore provided under this heading in Public Law 97-101 shall remain available for obligation for the fiscal year ending September 30, 1983, and shall be used by the Secretary for fiscal year 1983 requirements in accordance with section 9(a), notwithstanding section 9(d) of the United States Housing Act of 1937, as amended. (Emphasis added).

In any event, the permanent injunction of the District Court, cited above, and 31 U.S.C. §1502 (Recodification 1983)

(Appendix C-4, 5), which the Court of Appeals also overlooked, would prevent the funds in question from being returned to the Treasury's control.

The fact that the funds originated in the Treasury is of no legal consequence here. The Burr case supports this conclusion. The source of the Secretary's funds under the National Housing Act is also, with the exception of insurance premiums paid by private mortgagees, the U.S. Treasury. See paragraph entitled "Federal Housing Administration Fund" under Title I of the Appropriations Act, Pub. L. No. 97-272, 96 STAT. 1162.

(b) The Circuit Court of Appeals' holding that the United States Claims Court has jurisdiction to render

declaratory judgment and injunctive relief is in conflict with the following applicable decisions of this Court: United States v. Testan, 424 U.S., 392 (1976); United States v. King, 395 U.S. 1 (1969); Lee v. Thornton, 420 U.S. 139 (1975). Thus, the United States Claims Court could not provide the Authority with complete relief, especially regarding the equitable relief sought in its CIAP claim.

Likewise, this Court has previously decided that the district court has jurisdiction (1) when a federal officer acts beyond his statutory powers and (2) even though within the scope of his authority, the powers themselves or the manner in which they are exercised are constitutionally void. Larson v.

Domestic Foreign Commerce Corp., 337 U.S. 682 (1949); Dugan v. Rank, 372 U.S. 609 (1963).

The Circuit Court of Appeals disregarded the above authorities without discussion.

2. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME JURISDICTIONAL ISSUE.

All the Circuit Court of Appeals and the United States Claims Court appear to be in agreement that the United States Claims Court has exclusive jurisdiction in contract disputes against the United States involving more than $10,000 if there is no waiver of sovereign immunity and grant of subject

matter jurisdiction other than the Tucker Act. See Lindy v. Lynn, 501 F.2d 1367 (3rd Cir., 1974); American Science and Engineering, Inc. v. Califano, 571 F.2d 58 (1st Cir. 1978); International Engineering Co., Div. of A-T-O, Inc. v. Richardson, 512 F.2d 573 (D.C. 1975), cert. denied, 423 U.S. 1048 (1976); Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978); Estate of Watson v. Blumenthal, 586 F.2d 925, (2nd Cir., 1978); and The Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979).

However, the Circuit Court of Appeals for the Fourth Circuit apparently relied on the above authorities even though it acknowledged 42 U.S.C. §1404(a) was a waiver of the Secretary's defense of sovereign immunity.

(Appendix A-20). The Court also acknowledged the Authority's claim would require disposition of questions of federal law. (Appendix A-16).

In cases, with similar facts, against officers of the United States and/or federal agencies the Circuit Courts of Appeal are in disagreement as to whether the district court has jurisdiction of matters involving contracts or disputes in excess of $10,000 when there exists a waiver of immunity ["sue and be sued" clause] coupled with federal constitutional, statutory and common law questions.

Circuit Court of Appeals cases ruling the district court has such jurisdiction are: George H. Evans & Co. v. United States, et al, 169 F.2d 500

(3rd Cir., 1948); Mar v. Kleppe, 520 F.2d 867 (10th Cir., 1975); Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976); S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2nd Cir. 1979); and Armour Elevator Co. v. Phoenix Urban Corp., 655 F.2d 19 (1st Cir., 1981).

The theory of these cases rests upon the Congressional intent in enacting the waiver of immunity by considering whether the claim against the government officer and/or federal agency is of the type for which a private enterprise doing business in the commercial world would be liable. Therefore, a judgment against a federal officer paid from funds within the officer's control would not prevent a

district court from exercising subject matter jurisdiction. Trans-Bay Engineers & Builders, Inc. v. Hills, supra, p. 376.

Circuit Court of Appeals cases ruling the district court does not have jurisdiction are: Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644 (5th Cir., 1980); Lomas & Nettleton Co. v. Pierce, 636 F.2d 971 (5th Cir., 1981); Marcus Garvey Square v. Winston Burnett Const., 595 F.2d 1126 (9th Cir., 1979); and and United States v. Adams, 634 F.2d 1261 (10th Cir., 1980).

The theory of these cases is based upon the position that funds whose origin was the Treasury always remain "Treasury Funds" even though they later come within the control of federal

agencies engaged in the business of commercial enterprise and thus the suit is against the sovereign and the Tucker Act provides the only waiver of immunity and subject matter jurisdiction. Marcus Garvey Square v. Winston Burnett Const., supra, p. 1131.

This conflict among the Circuit Courts of Appeals should be resolved by this Court.

3. THE QUESTION PRESENTED IS ONE OF NATIONAL IMPORTANCE.

The national impact of the dispute on the merits between the Authority and the Secretary is not before this Court at this time, nevertheless, the jurisdictional issue now before this Court is of national importance. There are

numerous federal agencies operating in the commercial world for whom Congress has enacted waivers of immunity. Whether these federal agencies with funds within their control may be sued in the district court regarding Federal questions is an issue which this Court should decide.

CONCLUSION

This Petition makes clear that the Circuit Court of Appeals' opinion vacating the declaratory judgment and injunctive relief awarded by the District Court to the Authority is (1) in conflict with applicable decisions of this Court and (2) in conflict with decisions of other federal Courts of Appeals. In addition, this

jurisdictional issue is of national importance inasmuch as many federal agencies had their immunity waived by Congress are involved in the commercial world.

The confusion which now exists between the Circuit Courts of Appeals may provide appellate courts flexibility, but it places an unnecessary hardship on the district court judges, attorneys practicing in the federal courts, and most of all on those who seek to resolve disputes in the federal courts. The issue is ripe for this Court to decide. A Writ of Certiorari should be granted.

Respectfully submitted,

PORTSMOUTH REDEVELOPMENT
AND HOUSING AUTHORITY

By Gordon B. Tayloe, Jr.
Gordon B. Tayloe, Jr.

Gordon B. Tayloe, Jr.
Ralph W. Buxton
Counsel for Petitioner,
Portsmouth Redevelopment
and Housing Authority
P. O. Box 1475
Portsmouth, Virginia 23705

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 1983, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following:

Ms. Freddie Lippstein
Attorney
Appellate Staff
Civil Division, Room 3616
Department of Justice
Washington, D. C. 20530

Ms. Suzanne Grealy Curt
Trial Attorney
U. S. Department of Housing and
Urban Development
Washington, D.C. 20410

Ms. Elsie Munsell
United States Attorney
c/o Michael L. Rhine
Assistant United States Attorney
Walter E. Hoffman Federal
Court Bldg.
Norfolk, Virginia 23501

I further certify that all parties required to be served have been served.

Gordon B. Tayloe, Jr.

Gordon B. Tayloe, Jr.
P. O. Box 1475
Portsmouth, Va. 23705

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 82-2138

Portsmouth Redevelopment
and Housing Authority, Appellee,

v.

Samuel R. Pierce, Jr.,
Secretary of the United
States Dept. of Housing
and Urban Development;
Philip Abrams, Assistant
Secretary for Housing,
United States Dept. of
Housing and Urban De-
velopment; I. Margaret
White, Area Manager,
United States Dept. of
Housing and Urban De-
velopment, Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Judge.

Argued March 9, 1983

Decided April 27, 1983

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Freddi Lipstein, Appellate Staff, Civil Division, Dept. of Justice (Gershon M. Ratner, Associate General Counsel for Litigation, Howard M. Schmeltzer, Special Assistant, Suzanne Grealy Curt, U.S. Dept. of Housing & Urban Development; J. Paul McGrath, Assistant Attorney General, Elsie Munsell, United States Attorney on brief) for appellants; Ralph W. Buxton and Gordon B. Tayloe, Jr. (Cooper, Davis, Kilgore, Parker, Leon & Fennell, P.C., on brief) for appellee.

BUTZNER, Senior Circuit Judge:

The Secretary of the Department of Housing and Urban Development (HUD) appeals from the district court's grant of summary judgment awarding Portsmouth Redevelopment and Housing Authority certain declaratory and injunctive relief. Because the district court lacked subject matter jurisdiction, we vacate its order and remand the case with instructions to transfer it to the United States Claims Court.

I

The Authority is a municipal corporation which operates a number of low income housing facilities in Portsmouth, Virginia. It receives several types of federal subsidies pursuant to an annual contributions

contract (ACC) with HUD and the provisions of 42 U.S.C. §§1437-1437n. Supplemental contributions for operating expenses (operating subsidies) are made available to the Authority on an annual basis in accordance with the terms of its ACC and 42 U.S.C. §1437g. At the time the Authority and HUD entered into the ACC, section 1437g provided in part: "The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds." In 1979 Congress amended section 1437g by adding the following clause to the sentence we have quoted: "and such contract shall provide that no disposition of the lower income housing project, with respect to which the contract

is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary." Pub. L. No. 96-153, §211(a)(3), 93 Stat. 1110, 42 U.S.C. §1437g(a)(1)(1979). Pursuant to his general rule making powers under 42 U.S.C. §3535(d), the Secretary of HUD promulgated a regulation that requires each public housing agency operating under an existing annual contributions contract to execute an amendment to its contract embodying the new language of section 1437g(a)(1). See 24 C.F.R. §869.105(a)(1980).

The Authority refused to execute an amendment to its ACC, and HUD began withholding operating subsidies. In

addition, HUD declined to consider the Authority's application for funds under the Comprehensive Improvement Assistance Program (CIAP), 42 U.S.C. §1437l. The parties have stipulated that the CIAP application would have been approved were it not for the Authority's refusal to execute the amendment.

The Authority filed a complaint in federal district court seeking to enjoin HUD from withholding operating subsidies due under its ACC. The original complaint requested that HUD be required to release $676,085, the amount of funds allegedly wrongfully withheld during fiscal years 1981-82 and 1982-83, and that it be enjoined from requiring the Authority to execute an amendment as a prerequisite to receiving operating

subsidies or having its CIAP application considered. An amended complaint filed by the Authority excluded the request for specific monetary relief and instead asked the court to "direct an accounting of those sums owed . . . as a result of the [Secretary's] erroneous interpretation of [section 1437g(a)(1)] and the resulting wrongful withholding of operating sudsidies and CIAP funds."

The Secretary filed a motion to dismiss for lack of jurisdiction, alleging that the action was essentially a contract claim against the federal government for an amount exceeding $10,000 and jurisdiction thus belonged exclusively to the Claims Court under the Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491. The district court denied

HUD's motion, ruling that HUD had waived its sovereign immunity in 42 U.S.C. §1404a and that the district court had federal question jurisdiction under 28 U.S.C. §1331. The court decided the merits of the case in the Authority's favor and issued the requested declaratory and injunctive relief.

We agree with the Secretary that subject matter jurisdiction over this action belongs exclusively in the Claims Court. Because we dispose of this appeal on jurisdictional grounds, we do not address the merits of the Authority's claim except to the extent they bear on the question of jurisdiction.

II

The Tucker Act establishes three conditions which, if satisfied, vest

subject matter jurisdiction exclusively in the Claims Court. The action must be against the United States, seek monetary relief in excess of $10,000, and be founded upon the Constitution, federal statute, executive regulation, or government contract. See 28 U.S.C. §§1346(a)(2) and 1491.

It is not necessary that the United States be denominated as a party. An action against a federal agency or official will be treated as an action against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or intertere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act." Dugan v. Rank, 372

U.S. 609, 620 (1963) (citations omitted).

This is a suit against a federal official for acts performed within his official capacity, and, consequently, it amounts to an action against the sovereign. See Southern Sog, Inc. v. Roland, 644 F.2d 376, 380 (5th Cir. 1981); Ippolito-Lutz, Inc. v. Harris, 473 F.Supp. 255, 259 (S.D.N.Y. 1979). Furthermore, any monetary judgment recovered in this case would expend itself on the public treasury. There is no "separate fund" for the payment of operating subsidies within HUD's exclusive control, "the origin of which [is] not the public treasury." Southern Sog, Inc., 644 F.2d at 379; see also Lomas & Nettleton Co. v. Pierce, 636

F.2d 971, 973-74 (5th Cir. 1981). The funds appropriated to HUD for payment of operating subsidies clearly originate in the public treasury, and they do not cease to be public funds after they are appropriated.[1] Therefore, both because this is a suit against a federal official and any judgment recovered would expend itself on the public treasury, we construe this action as one against the United States for purposes of the Tucker Act.

The second requirement for Tucker Act jurisdiction is that the claim seek monetary relief in excess of $10,000.

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[1] See, e.g., Appropriations Act, Pub. L. No. 97-101, 95 Stat. 1417, 1418 and 1436 (1981).

The Authority's primary objective in this action is to recover money allegedly wrongfully withheld by the federal government. The amount involved far exceeds the jurisdictional prerequisite. Although the Authority's amended complaint phrases its request for money as a request for equitable relief, Claims Court jurisdiction cannot be avoided by framing an essentially monetary claim in injunctive or declaratory terms. Hoopa Valley Tribe v. United States, 596 F.2d 435, 436 (Ct. Cl. 1979).

The Authority also contends that in light of the other equitable claims at stake, the Claims Court would be unable to render a complete and effective remedy because it lacks the power to grant injunctive or declaratory relief.

This argument lacks merit for two reasons. First, where a claim primarily seeks monetary relief, it is improper to deny the Claims Court jurisdiction simply because it cannot grant the precise equitable relief sought. American Science & Engineering, Inc. v. Califano, 571 F.2d 58, 62 (1st Cir., 1978). A district court does not gain jurisdiction over a Tucker Act claim simply because the complaint couples requests for monetary relief with requests for injunctive relief. Cook v. Arentzen, 582 F.2d 870, 878 (4th Cir. 1978).

Furthermore, the Claims Court can issue declaratory relief that is "tied to and subordinate to a monetary award." S. J. Groves & Sons Co. v. United

States, 495 F.Supp. 201, 209 (D. Colo. 1980); see also Gentry v. United States, 546 F.2d 343, 346 (Ct. Cl. 1976). A 1972 amendment to 28 U.S.C. §1491 endows the Claims Court with limited equitable jurisdiction incidental to its jurisdiction over monetary claims because it provides: "In any case within its jurisdiction, the [Claims Court] shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." See also S. J. Groves & Sons Co., 495 F.Supp. at 209. Therefore, the Claims Court is capable of awarding the Authority the relief it seeks.

The third and final requirement for Tucker Act jurisdiction is that the

claim be founded upon the Constitution, federal statute, executive regulation, or government contract. The Authority contends that this action arises out of federal law and that the district court has jurisdiction under 28 U.S.C. §1331.

The gravamen of the Authority's claim is that HUD cannot modify its contractual obligation to pay operating subsidies by unilaterally altering the terms of the ACC. The answer to this issue depends on whether Congress intended to authorize the Secretary to modify existing annual contributions contracts by incorporating the new provisions of § 1437g(a)(1), and, if this was its intention, whether the modification infringes any constitutionally protected interests of the

Authority. The primary basis for the Authority's challenge to the Secretary's actions, therefore, is the government contract. Although disposition of this claim necessitates adjudication of some questions of federal law, "efforts to ground [jurisdiction] on the federal question statute have consistently been rejected by courts because the effect would be to undercut the exclusive jurisdiction of the Court of Claims." American Science & Engineering, Inc., 571 F.2d at 63.

Furthermore, the Tucker Act gives the Claims Court jurisdiction over actions against the United States founded upon the Constitution, federal statutes, and regulations, as well as upon government contracts.

Consequently, the Claims Court is the proper forum for this action, whether it is characterized as one in contract or one to interpret provisions of the Constitution, federal statutes, or regulations pertaining to the contract. Lee v. Blumenthal, 588 F.2d 1281, 1282 (9th Cir. 1979); see also Estate of Watson v. Blumenthal, 586 F.2d 925, 929 (9th Cir. 1978).

Finally, the Authority contends that the district court has jurisdiction under 42 U.S.C. §1404a. That section provides that the "United States Housing Authority may sue and be sued only with respect to its functions under this chapter, and sections 1501 and 1505 of this title." The Authority argues that section 1404a both waives sovereign

immunity and supports federal question jurisdiction by the district court.

In support of its position, the Authority relies on Ferguson v. Union National Bank, 126 F.2d 753, 756-57 (4th Cir. 1942), where this court interpreted 12 U.S.C. §1702, another "sue and be sued" clause. Section 1702 provides that the "Secretary shall, in carrying out the provisions of this [chapter], be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." In Ferguson, we reasoned that Congress could not have intended for suits over $10,000 to be brought in "any state court of general jurisdiction, but in the federal jurisdiction only in the Court of Claims." Ferguson,

126 F.2d at 756. Consequently, we held that section 1702 not only waived sovereign immunity but also conferred subject matter jurisdiction in the federal district court. Although the Authority does not contend that section 1702 governs this action, it argues that sections 1404a and 1702 are similar and that Ferguson, by analogy, is applicable.

The two "sue and be sued" clauses are substantially different, however, and it is precisely this difference that renders Ferguson inapposite. Section 1404a does not contain the critical language "in any court of competent jurisdiction, State or Federal," and thus the basis for our reasoning in Ferguson does not exist here. See A. L.

Rowan & Son v. HUD, 611 F.2d 997, 1000-01 n.3 (5th Cir. 1980). Therefore, although section 1404a waives sovereign immunity, unlike section 1702 it does not vest jurisdiction in the district court. See Jemo Associates v. Greene Metro. Housing Authority, 523 F.,Supp. 186, 187 (S.D. Ohio 1981).

In sum, because this essentially is a contract claim against the federal government for monetary relief in excess of $10,000, the Claims Court has exclusive jurisdiction under 28 U.S.C. §§1346(a)(2) and 1491. Accordingly, the district court was without jurisdiction to hear this case. We vacate the district court's judgment and remand with instructions to transfer the case

to the Claims Court pursuant to 28 U.S.C. §1406(c).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 82-2138

PORTSMOUTH REDEVELOPMENT
AND HOUSING AUTHORITY,

Appellee,

versus

SAMUEL R. PIERCE, JR.,
etc., et al,

Appellants.

O R D E R

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no

judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

It is FURTHER ORDERED that upon motion of the Portsmouth Redevelopment and Housing Authority the mandate is stayed for 30 days, pursuant to Rule 41(b), pending application to the Supreme Court for a writ of certiorari.

Entered at the direction of Judge Butzner for a panel consisting of Judge Murnaghan, Judge Chapman, and Judge Butzner.

For the Court,

/s/ William K. Slate, II

CLERK

FILED
JUNE 20, 1983

U. S. Court of Appeals
Fourth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

PORTSMOUTH REDEVELOPMENT
AND HOUSING AUTHORITY,

Plaintiff,

v. CIVIL ACTION
NO. 82-772-N

SAMUEL R. PIERCE, JR.,
SECRETARY OF THE
UNITED STATES DEPARTMENT
OF HOUSING AND URBAN DE-
VELOPMENT, et al.

Defendants.

MEMORANDUM OPINION

This matter was tried before the Court on November 16, 1982. At trial the defendants renewed an earlier motion to dismiss this action and submitted a motion for summary judgment. The plaintiff responded to the defendant's motions and also requested an entry of

summary judgment in its favor. All parties have agreed that there are no material facts in dispute.

On September 30, 1982, the plaintiff, the Portsmouth Redevelopment and Housing Authority (hereinafter PRHA), filed its complaint which it amended on October 25, 1982. In Count I of the amended complaint, PRHA alleged that defendant Pierce, the Secretary of the United States Department of Housing and Urban Development (hereinafter "the Secretary") had improperly withheld consideration of PRHA's pending application for annual low income housing operating subsidies on the ground that PRHA refused to execute an amendment to a 1976 Annual Contributions Contract (which contract guaranteed the payment

of annual operating subsidies so long as funds are available for the term of the agreement in accordance with the then applicable statute). The amendment would have required PRHA to maintain the low income character of its housing projects for a period of ten years after the federal operating subsidy contributions had ceased. PRHA contends that the Secretary exceeded the authority granted to him by Congress when he promulgated 24 C.F.R. §869.105(a), the regulation requiring local housing authorities to execute the contractual amendment as a prerequisite to obtaining current annual operating subsidies. As applied to PRHA, it is also alleged that this regulation deprives this local housing authority of rights guaranteed

to it under its contract and the Fifth Amendment.

A similar contention is raised by PRHA in Count II of the amended complaint. In Count II, PRHA alleges that it submitted a proper and timely application to HUD for Comprehensive Improvement Assistant Funds (hereinafter "CIAP" funds) pursuant to 42 U.S.C. §1437(1). PRHA states that it is in immediate need of these funds to finance certain repairs; in particular funds are needed to repair or replace a rapidly deteriorating heating distribution system in one ot its housing projects. PRHA charges that the Secretary has been unwilling to consider PRHA's application tor CIAP funds in the absence of PRHA's execution of the amendment to the 1976

Annual Contributions Contract, which amendment would require PRHA to operate the six subsidized projects as such for ten years after the subsidy payments had ceased.

The plaintiff asks this Court to declare that 24 C.F.R. §869.105(a) should not be applied by the Secretary in his consideration of the plaintiff's application for operating subsidies or CIAP funds because PRHA has an existing contract. PRHA also seeks an injunction requiring the Secretary to consider its application for the funds in the absence of the challenged amendment to the Annual Contributions Contract. The Secretary contends the present statutes allowing for the payment of these subsidies authorize the promulgation and

enforcement of the regulation requiring the amendment to the existing contracts, and therefore he can require the housing authority to operate the low rent housing projects for ten years after the cessation of operating subsidies.

The defendants have elected not to file an answer to the complaint. The defendants agree that the factual averments of the plaintiff are correct, but contend that the plaintiff's legal conclusions regarding the particular statutes and regulation are erroneous. In lieu of an answer, the defendants have filed a motion to dismiss on the ground that this Court lacks jurisdiction contending that the Court of Claims has exclusive jurisdiction and a motion for summary judgment on the ground that

there are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law.

The defendants' motions to dismiss and for summary judgment are DENIED. Summary judgment will be entered in favor of the plaintiff PRHA in a manner more fully set forth below.

I.

The Court will first address the threshold jurisdictional question raised by the defendants in their motion. The defendants contend that jurisdiction over this action lies exclusively in the Court of Claims because the defendants maintain that the plaintiff's allegations are fundamentally contractual in nature and are in excess of $10,000.

The plaintiff argues that this action is not ex contracto, but rather is one which stems from the Secretary's wrongful exercise of the authority granted to him under 42 U.S.C. §1437(g) and §1437(l). Therefore, this Court does have the requisite jurisdiction under 28 U.S.C. §1331 to entertain this action.

Jurisdiction over the plaintiff's claim is conferred upon this Court by 28 U.S.C. §1331. Section 1331 of Title 28 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331 (1982 Cum. Supp.). Pursuant to 28 U.S.C. §1346(a)(2), the district court shall have original jurisdiction concurrent with the Court

of Claims with regard to any civil action or claim against the United States "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of the executive department, or upon any express or implied contract with the United States, or for liquidated damages, in cases not sounding tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to Sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. 28 U.S.C. §1346(a)(2) (1982 Cum. Supp.).

Under 42 U.S.C. §1404(a), the United States Housing Authority may sue and be sued with regard to the performance of its functions under this Chapter.[1] In Ferguson v. Union National Bank of Clarksburg, West Virginia, 126 F.2d 753 (4th Cir. 1942), the Fourth Circuit held that a similar sue and be sued provision involving the Federal Housing Administrator operated as a waiver of the Agency's sovereign immunity and could support federal question jurisdiction over the civil action by a

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[1] The functions, powers and duties of the United States Housing Authority have been transferred by statute to the Secretary of Housing and Urban Development. 42 U.S.C. §3534 (1977).

district court. See also United States v. Adams, 634 F.2d 1261 (10th Cir., 1980). Although subsequent decisions have interpreted that such a sue and be sued clause would not operate as complete waiver of the sovereign immunity of the United States when the federal government is the real party in interest, see e.g. Marcus Garvey Square v. Winston Burnett Construction Co. of California, 595 F.2d 1126 (9th Cir., 1979); Armor Elevator Co., Inc. v. Phoenix Urban Corp., 493 F.Supp. 876 (D. Mass. 1980), such a rule will not foreclose the maintenance of PRHA's action in this Court because the United States is not the true party in interest here.

Admittedly, if this Court were to construe PRHA's claims as those which merely required a judicial construction of the 1976 Annual Contributions Contract culminating in a damage recovery in excess of $10,000 then the action would have been brought against the United States for damages, this Court may lack jurisdiction and the action might be appropriate for transfer to the Court of Claims. See Mecapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982); International Engineering Co. Division of A-T-O, Inc. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975).

However, the basis of PRHA's claims transcends the 1976 agreement. It is the Secretary's alleged improper exercise of his statutory authority by

refusing to consider PRHA's application for §1437(g) and §1437(l) funds which provides the underlying basis for this action. This issue cannot be resolved simply by a judicial interpretation of the 1976 agreement. To the contrary, the Secretary's present and future obligations vis-a-vis PRHA are equally, if not more, dependent upon those equitable rights generated by HUD's activities performed in accordance with the federal statutes and regulations governing the contracts which the agency has sponsored and prescribed as a prerequisite to federal aid. Rooted both in federal statutory law and federal common law, PRHA's claims for relief give this Court §1331 jurisdiction. Trans-Bay Engineers & Builders,

Inc. v. Hills, 551 F.2d 370, 377 (D.C. Cir. 1976). See Illinois v. City of Milwaukee, Wisconsin, 406 U.S. 91 (1972). Cf. Rowe v. United States, 633 F.2d 799 (9th Cir. 1980) (the district court has §1331 jurisdiction to review agency action under the Administrative Procedure Act, subject only to preclusion of review statutes created or retained by Congress) (citing Califano v. Sanders, 420 U.S. 99, 105 (1977).

The conclusion that this Court has jurisdiction to adjudicate this dispute is further buttressed by the well-established rule that the Court of Claims has no inherent power to grant injunctive or declaratory relief. See United States v. Testan, 424 U.S. 392 (1976); Richardson v. Morris, 409 U.S.

464 (1973) (per curiam); Rowe v. United States, supra at 802; Berdick v. United States, 612 F.2d 533 (Ct. Cl. 1979). It is clear that a complete and effective remedy could not be rendered here by any court which lacked injunctive or declaratory powers because future rights and obligations are as much at stake as present rights and obligations. In resolving this dispute, a court must not only consider the various rights and responsibilities of the parties actually named in this litigation, but it must also take into account the immediate needs and the future well-being of the tenants residing in Portsmouth's federally subsidized low-income housing projects.

If called upon to adjudicate the merits of PRHA's claims, the Court of Claims would face the difficult task of finding satisfactory substitutes for declaratory and/or injunctive powers in its efforts to formulate an appropriate remedy. This Court, however, faces no such obstacles. It has these extraordinary powers at its disposal and it would have little difficulty fashioning a remedy which could take into account the competing rights and interests involved in this litigation.

Time considerations also militate against the transfer of this action to the Court of Claims. November 30, 1982 is the target date for final review of applications for CIAP funding and execution of agreements actually

granting the same. (See discussion, infra).

The Court is of the opinion that it does have subject matter jurisdiction to consider the merits of PRHA's claims. The defendants' motion to dismiss the action for lack of jurisdiction is DENIED.

II.

Having determined that it has jurisdiction, this Court turns now to the merits of PRHA's complaint. The parties have agreed that there are no factual issues in dispute. A brief summary of the government's participation in the establishment and operation of those low income housing programs at issue here and its recent dealings with

PRHA will provide the backdrop for the claims set forth in the complaint.

As with most litigation, the primary basis for the litigation lies not only in what is apparent from the complaint or the applicable statutes, but also in the problems attendant to how, to whom and by whom such statues are applied.

The Portsmouth Redevelopment and Housing Authority is a municipal corporation created by and organized under the laws of Virginia. It is managed by a Board of Commissioners who are public-minded citizens and who perform their duties as a service to the community without pay.

Portsmouth is a city with a commercial underpinning which is largely

governmental. Because of this, it has been known to possess a relatively weak tax base. Additionally, Portsmouth maintains a substantial number of public housing and subsidized public housing units. At present, the city has approximately 2,356 public housing units.

The United States Housing Act originally authorized the distribution of funds to local housing authorities to subsidize the interest payment on bonds which were issued to finance the construction of low income housing. These subsidies are disbursed to local housing authorities in accordance with contracts, known as forty year annual contributions contracts. In exchange for debt service subsidies local housing authorities are required to provide

housing for low income persons. See 42 U.S.C. §1437(a) (1978 and 1982 Cum. Supp.).

Prior to 1969, local housing authorities, such as PRHA, were able to charge a minimal rent which was determined in relation to its ability to operate the project. In 1969 Congress enacted the Brooke Amendment which tied rent to a specific portion of the tenant's income. That statute is presently codified in 42 U.S.C. §1437(a) (1978 and 1982 Cum. Supp.). To compensate for the limits imposed upon the rents to be charged, Congress authorized the payment of an annual operating subsidy which was guaranteed over the lifetime of an annual contributions

contract, so long as the funds were available.[2]

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[2] Prior to the 1979 amendment, Section 1437(g)(a) read as follows:

> (a) In addition to the contributions authorized to be made for the purposes specified in section 1437c of this title, the Secretary may make annual contributions to public housing agencies for the operation of low-income housing projects. The contributions payable annually under this section shall not exceed the amounts which the Secretary determines are required (1) to assure the low-income character of the projects involved, and (2) to achieve and maintain adequate operating services and reserve funds. The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds. For purposes of making payments under thsi section, the Secretary shall establish standards for costs of operation and reasonable projections of income, taking into

(Footnote Continued)

In 1979, Congress passed an amendment to 42 U.S.C. §1437(g)(a). It added the following language:

> The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payments subject to the availability of funds, and such contract shall provide that no disposition of the low-income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary.

(Footnote Continued)
account the character and location of the project and characteristics of the families served, or the costs of providing comparable services as determined in accordance with criteria or a formula representing the operations of a prototype well-managed project.

42 U.S.C. §1437(g)(a)(1)(1982 Cum.Supp.).

Pursuant to his general rule making powers under 42 U.S.C. §3535(d)(1977), the Secretary promulgated 24 C.F.R. §869.105(a)[3] which essentially requires

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[3] That regulation provides as follows:

> ACC Amendment. As a condition for the first HUD approval for payment of Operating Subsidy with respect to the projects under a particular ACC for a PHA fiscal year beginning after the effective date of this part, the PHA and HUD shall enter into an amendment to the ACC for all projects under the ACC. This ACC amendment shall provide that the ACC provisions related to project operation shall continue in effect with respect to each project under the ACC for a period of 10 years after the end of the last PHA fiscal year for which Operating Subsidy is paid
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> (Footnote Continued)

an authority which seeks annual operating subsidies to continue operating such units as low income housing units for a period of ten years after the receipt of the last operating subsidies.

In 1980, Congress instituted the Comprehensive Improvement Assistance Program. 42 U.S.C. §1437(1) (1981 Cum.Supp.). This program authorizes the Secretary to make available financial assistance to public housing agencies to improve the physical condition and to upgrade the management and operation of low-rent public housing projects.

(Footnote Continued)
with respect to the project.

24 C.F.R. §869.105(a) (1980).

III.

In 1976 PRHA entered into a consolidated Annual Contributions Contract with HUD. This agreement effectively consolidated four separate Annual Contributions Contracts entered into by the parties from 1952-1956. The following projects are covered by this 1976 Annual Contributions Contract: (1) the Dale Home Project which is comprised of 300 dwelling units; (2) the Swanson Home Project which is comprised of 210 dwelling units; (3) the Jeffrey Wilson Home which is comprised of 400 dwelling units; (4) the Ira Barbour Park Project which is comprised of 665 dwelling units; (5) the Lincoln Park Project which is comprised of 188 dwelling units; and (6) the Washington Park

Project which is comprised of 160 dwelling units.

Section 415(D) of the Annual Contributions Contract requires the government to make additional annual contributions to PRHA for each fiscal year in an amount which together with all other operating receipts of the projects will be sufficient to pay the operating expenditures of such projects in accordance with the operating budgets for such projects as approved by the government, and with respect to a project for which payments of debt services or basic annual contributions will be made for a period of less than forty years, in an amount and for purposes as approved by the government to provide for necessary initial

expenses not charged to the development of the project. Under paragraph D(1) of Section 415, PRHA is under a duty to submit to the government together with the operating and development budgets for the projects an estimate of the amount of additional annual contributions which will be necessary for the period covered by such budget. The government may approve the estimate in full or in a reduced amount and the amount so approved pursuant to such estimate or any revision thereof shall constitute the maximum amount of additional Annual Contributions payable in respect to the projects for the period covered by such budget.

Sometime in the spring of 1981, HUD, pursuant to 24 C.F.R. §869.105(a),

advised PRHA that it would be required to execute the amendment to the 1976 Annual Contributions Contract as a prerequisite to consideration of PRHA's application for annual operating subsidies. At least some of PRHA's commissioners recognized the tremendous implications of such an amendment--namely, the prospect of finding satisfactory, alternative sources of funding once the federal operating subsidies ceased and/or exposure to some form of liability should they fail to locate the same--because on July 14, 1981, a resolution was passed at a meeting of the PRHA commissioners, stating that PRHA would only execute the

so-called "Amendatory Agreement No. 6"[4] to the 1976 Annual Contributions Contract under duress. Resolution #893 was communicated by letter dated July 15,

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[4] Amendatory Agreement No. 6 would have added the following language to the 1976 Annual Contributions Contract:

> Notwithstanding any other provision of this contract, no disposition of any low-income housing project covered by this contract shall occur during and for ten years after the period when contributions were made for the operation of the project, unless approved by the Government. In addition, the Government agrees to provide assistance for the operation of any such project, as provided by Section 415 of this contract, as long as the low-income nature of the project is maintained. The provision of Article II, III, IV and V of this contract, relating to operations, are hereby extended for the duration of such assistance.

1981 to the area manager of HUD. On August 12, 1981, counsel for HUD's Richmond area office advised PRHA that it would not process and forward to the Office of Finance and Accounting a request for operating subsidies which reflected that PRHA had signed the amendment to the Annual Contributions Contract under duress.

PRHA has requested $247,272 in operating subsidies for the balance of fiscal year 1981-1982. Additionally, PRHA has sought $401,813 in operating subsidies as an advancement for fiscal year 1982-1983. The City of Portsmouth recently voted not to furnish to PRHA with the funds necessary to meet its operational demands in the event that

PRHA's request for operating subsidies is denied by HUD.

By letter dated March 5, 1982, PRHA wrote to the Richmond area manager of HUD, requesting that PRHA not be compelled to execute Amendatory Agreement No. 6 as a prerequisite to HUD's consideration of PRHA's application for CIAP funds. Thereafter, on May 17, 1982, PRHA forwarded to HUD's area manager a copy of Resolution #936 which was adopted on May 5, 1982. Akin to Resolution #893, Resolution #936 expressed PRHA's willingness to execute the clause amending the 1976 Annual Contributions Contract.

On August 3, 1982, PRHA submitted its preliminary application for CIAP funds. This application set forth a

breakdown of the modernization funding need by PRHA for the years 1981-1985, in addition to any priorities assigned to particular projects. PRHA requested $7,321,028.00 in CIAP funds from which $2,881,444.00 were to be used for the repair and/or replacement of the aging heat distribution system at the Jeffrey Wilson Project.

CIAP funds are earmarked for annual allocation on September 30th. Applications for CIAP funds must be received by the agency on or before November 12th. At that time, they are reviewed with an eye toward a target approval date of November 30th. The parties have stipulated that PRHA's application for CIAP funds would have been approved by HUD but for PRHA's continuing refusal to

execute the contractual amendment, which amendment required PRHA to comply with the disputed portions of the 1979 amendment to 42 U.S.C. §1437(g)(a)(1) and the regulation 24 C.F.R. §869.105(a).

IV.

The legitimacy of the Secretary's actions with regard to the operating funds depends upon the interpretation of that part of §1437(g)(a)(1) which requires him to embody provisions for annual contributions in a contract guaranteeing their payment subject to the "availability of funds."

The Secretary concedes that the money sought by PRHA has been appropriated and is available for disbursement

to PRHA. He argues, however, that the phrase "availability of funds" does not only connote an appropriation by Congress, but rather implies any conditions which the Secretary may impose upon a local housing authority in a given fiscal year, provided that any such condition is reasonable and fosters a legitimate governmental purpose. This power purportedly encompasses even the government's unilateral[5] alteration of rights under existing contracts with private concerns.

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[5] The inclusion of the added requirement has been characterized as a "unilateral" act on the part of the Secretary by the Assistant General Counsel of Housing (See Gelletich Deposition at 27).

It has been held that, unless Congress provides otherwise, when it contracts with a private party, the United States is subject to the same laws and principles which govern individual parties to a contract. Priebe v. United States, 332 U.S. 407 (1947); United States v. Bostwick, 94 U.S. [4 Otto] 53 (1876). Although the United States is not included within the Constitutional prohibition preventing states from passing laws which impair the obligations of contracts, it is prohibited from depriving persons or corporations of property without due process of law. The government of the United States is as much bound by the terms and obligations of its contracts as is an individual. If the federal

government repudiates its obligations under a valid agreement, its acts constitute as much a repudiation, with all the wrong and reproach that that term implies, as it would be if the wrongdoing party had been as state, municipality, or a citizen. The Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719 (1878). See Lynch v. United States, 292 U.S. 571 (1934).

Neither the language set forth in the 1976 Annual Contributions Contract nor the language of §1437(g)(a)(1) supports the Secretary's interpretation that an existing agreement guaranteeing the annual distribution of operating subsidies can be arbitrarily and

unilaterally[6] altered by the government simply because the government believes that any such change would further an interest, albeit reasonable, of the federal government. What is clear from the language of §1437(g)(a)(1) is that any future annual contributions contract shall provide that no disposition[7] of

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[6] The evidence indicated that HUD officials not only perceived the Secretary's action as unilateral in nature, but that the regulation appeared to be inconsistent with the statute. (See August 12, 1982, letter from HUD's regional counsel to Michael Kay).

[7] The term "disposition" has been defined as the parting with, alienation of or giving up property. BLACK'S LAW DICTIONARY 423 (5th ed. 1979). The statute, therefore, appears to speak to a housing authority's desire to sell or alienate its projects.

the low-income housing project, with respect to which such future contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary. Even this statute with its most liberal construction, in no way refers to any duty or vests any power in the Secretary to alter the right of a party under an existing Annual Contributions Contract by requiring amendment thereto sufficient to condition that party's annual receipt of operating subsidies upon the maintenance of the projects for ten years after the federal subsidies have ceased.

By compelling the execution of such an amendment, the Secretary has

arbitrarily imposed upon PRHA additional duties not contemplated by the parties at the time the 1976 Annual Contributions Contract was executed. The Secretary's acts do not amount to a legitimate exercise of his wholly independent rulemaking powers, which would leave the basic rights and obligations of the parties under the contract intact. To the contrary, the Secretary's repudiation not only impairs the contractual rights of PRHA, but effectively undermines the basic thrust of a contract which guarantees the payment of operating subsidies. See Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 279-80 n. 33 (1969).

This Court also cannot overlook the inevitable dilemma facing PRHA and its

tenants should the Secretary be permitted to encumber the contract with an additional duty. Beginning in the year 1992, PRHA would be forced to locate an adequate, alternate source of funding for a period of ten years to replace the federal subsidies in order to maintain operation of its low income housing projects. If recent events portend the future, it will be extremely difficult for PRHA to obtain the funding necessary to operate its projects once the federal government subsidies are no longer forthcoming. How can the commissioners of PRHA possibly assume that once the federal subsidies have ceased the City of Portsmouth will see fit to furnish the necessary operating subsidies for ten years when the City has adamantly

refused to help PRHA out of the predicament in which it now finds itself.

Having determined that Congress, through §1437(g)(a)(1) could not and did not intend to condition the receipt of annual operating subsidies upon the execution of the amendment to PRHA's existing 1976 Annual Contributions Contract, this Court concludes that the Secretary's decision to refuse to consider PRHA's application for operating subsidies absent the execution of such an amendment is arbitrary, capricious, without statutory basis and in contravention of the plaintiff's rights under contract and the Fifth Amendment.

V.

The Court will now address the Secretary's unwillingness to consider

PRHA's application for CIAP funds due to PRHA's decision not to execute the amendment to the 1976 Annual Contributions Contract. It is undisputed that local housing authorities do not have an absolute right to receive CIAP funds. Under 42 U.S.C. §1437(1)(c)(2), comprehensive improvement assistance for existing public housing may be made available for projects which are owned by public housing agencies, are operated as rental housing projects, receive assistance under Section 1437(c) or Section 1437(g) of this title, are not assisted under §1437(f) of this title and meet such other requirements consistent with the purpose of this section as the Secretary may prescribe. 42 U.S.C. §1437(1)(c)(1) - (4) (Cum. Supp. 1981).

The purposes of the CIAP program are set forth succinctly in subparagraph (a) of §1437(1). The purposes of the CIAP program are to improve the physical condition of existing public housing projects and to upgrade the management and operation of such projects in order to assure that such projects continue to be available to serve low income families. 42 U.S.C. §1437(a)(1) and (2) (emphasis added).

There is no language in this subsection or in the remaining portions of §1437(1) which would suggest that one of the purposes of the CIAP funding program is to condition the consideration of an application for CIAP funds on the execution of an amendment to the Annual Contributions Contract. Congress

specitically omitted the language embodied in §1437(g) from §1437(l). If they intended it to apply, they merely should have added it. Congress established these funds for the physical improvement and upgrading of existing projects. [8]

It is readily apparent from the face of §1437(l) that these funds were not intended to be used as a means for extending the duration of the low income character of the projects because unlike

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[8] Congress should certainly have conditioned these funds had it chosen to do so. The Secretary endeavors to utilize awarding of funds to update one of Portsmouth's projects while requiring Portsmouth to continue low income housing for 10 years after cessation of funds for 5 other projects.

companion §1437(g)(a)(1), this statute does not speak to any need to incorporate into the contract for CIAP funds the language that no disposition of the low-income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary.

The Secretary seeks to do indirectly, through PRHA's application for CIAP funds, what he clearly cannot do directly through the PRHA's application for operating subsidies; that is to force an amendment to the 1976 Annual Contributions Contract. For the same reasons which governed its decision regarding the operating subsidies, the Court views

the rights of PRHA and its tenants under the 1976 Annual Contributions Contract as inviolate and subject only to the "availability" of funds" for the annual contributions. As such, it cannot countenance the Secretary's attempt to change the rights and duties established under that contract by utilization of financial assistance which Congress has provided to local housing authorities under a separate statute, for distinct reasons and by different rules. The Secretary simply has no authority to condition PRHA's application for CIAP funds on the execution of the amendment to the parties' 1976 Annual Contributions Contract.

This opinion is being entered on the 29th day of November, 1982 in order

to meet the Secretary's target date for the award of the funds of November 30, 1982, and, therefore, the Court reserves the right to correct, amplify, modify and elaborate on its reasons in a supplemental opinion.

United States District Judge

At Norfolk, Virginia
November 29, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
Norfolk Division

PORTSMOUTH REDEVELOPMENT
AND HOUSING AUTHORITY,

Plaintiff,

v.

CIVIL ACTION
NO. 82-772-N

SAMUEL R. PIERCE, JR.,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, et al.,

Defendants.

ORDER

Upon consideration of the entire matter and in accordance with the contemporaneous memorandum opinion, summary judgment is entered in favor of the Portsmouth Redevelopment and Housing

Authority, and it is hereby ORDERED and declared as follows:

(1) That the temporary injunction entered by written order of this Court on October 28, 1972 is hereby renewed and extended and made permanent except as the same may be modified in accordance with the memorandum opinion and/or further order of this Court or any court of competent jurisdiction.

(2) That Section 211(a) of the Housing and Community Development Amendment of 1979 now codified as 42 U.S.C. §1437(g)(a)(1) pertaining to the disposition of the low-income housing projects, does not apply under these facts to operating subsidies provided for in the Annual Contributions Contract entered into by the Portsmouth

Redevelopment and Housing Authority, Contract No. P-5515 dated July 1, 1976, in the manner and form as maintained by the Secretary under Regulation 24 C.F.R. §869.105(a).

(3) That under the facts in this case, the present application of the Portsmouth Redevelopment and Housing Authority now pending with the Secretary for Comprehensive Improvement Assistance Program Funds ("CIAP") under authority of 42 U.S.C. §1437(1) shall be considered by the Secretary insofar as it may pertain to projects contained within Contract No. P-5515, dated July 1, 1976, without regard to whether or not an amendment to said contract is entered into by the Portsmouth Redevelopment and Housing Authority agreeing to

continue to operate the projects contained within said contract as low-income housing for a period of ten years after the receipt of funds in accordance with 24 C.F.R. §869.105(a).

(4) That the Secretary, pursuant to its Contract P-5515 with the Portsmouth Redevelopment and Housing Authority, continue to fund further operating subsidies in accordance with this contract, so long as funds are available, and the Court finds that currently there is "availability of funds" in accordance with said contract and in accordance with 42 U.S.C. §1437(g) prior to its amendment and the current interpretation thereof by the Secretary in 24 C.F.R. §869.105(a).

(5) That the target date of November 30, 1982 being tomorrow, that the CIAP funds requested by the City of Portsmouth in accordance with this opinion be considered and the Secretary make a determination without regard to 24 C.F.R. §869.105(a) as said regulation does not pertain under the facts of this case to the existing contract of the Portsmouth Redevelopment and Housing Authority with the Secretary contrary to the interpretation placed on said regulation but the said Secretary.

(6) That an accounting be and the same is hereby ORDERED to make a determination of what funds the Portsmouth Redevelopment and Housing Authority may be entitled to and this matter shall remain on the docket for an accounting

of said funds pursuant to the equitable jurisdiction of this Court to authorize an accounting of funds due and owing the Portsmouth Redevelopment and Housing Authority.

(7) That this order and opinion may be modified and altered in furtherance of the memorandum opinion and upon further consideration inasmuch as this date, November 29, 1982, is one day prior to the target date of November 30, 1982, when the CIAP funds are targeted to be awarded by the Secretary.

(8) That this matter is continued on this docket for further order of this Court.

It is so ORDERED.

/s/ Robt. G. Doumar

United States
District Judge

Norfolk, Virginia

November 29th, 1982.

APPENDIX C

PERTINENT PROVISIONS OF STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §1331 Federal Question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

THE TUCKER ACT

28 U.S.C. §1346(a)(2)
"United States as Defendant"

> (a) The district courts shall have original jurisdiction concurrent with the United States Claims Court, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or

unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. 1491(a)
Claims against United States Generally

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or

unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought

before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

MONEY AND FINANCING-- APPROPRIATION ACCOUNTING

31 U.S.C. §1502. BALANCES AVAILABLE

(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

(b) A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury

at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.

HOUSING ACT OF 1948

42 U.S.C. §1404a. United States Housing Authority; right to sue.

The United States Housing Authority may sue and be sued only with respect to its functions under this chapter, and sections 1501 to 1505 of this title. Funds made available for carrying out the functions, powers, and duties of the Authority (including appropriations therefor, which are authorized) shall be available, in such amounts as may from year to year be authorized by the Congress, for the administrative expenses of the Authority. Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, the United States Housing Authority, or any State or local public agency administering a low-rent housing project assisted pursuant to this chapter or sections 1501 and 1505 of this title shall continue to have the right to maintain an

action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501 to 1505 of the title, the United States Housing Authority is authorized, where it finds such action equitable and in the public interest, to exclude amounts or portions thereof paid by the United States Government for disability or death occurring in connection with military service.

UNITED STATES HOUSING ACT
OF 1937

42 U.S.C. §1437g(a) [Prior to 1979] Annual contributions for operation of low-income housing projects

(a) In addition to the contributions authorized to be made for the purposes specified in section 1437c of this title, the Secretary may make annual contributions to public housing agencies for the operation of low-income housing projects. The

contributions payable annually under this section shall not exceed the amounts which the Secretary determines are required (1) to assure the low-income character of the projects involved, and (2) to achieve and maintain adequate operating services and reserve funds. The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds. For purposes of making payments under this section, the Secretary shall establish standards for costs of operation and reasonable projections of income, taking into account the character and location of the project and characteristics of the families served, or the costs of providing comparable services as determined in accordance with criteria or a formula representing the operations of a prototype well-managed project.

SECTION 211(a), HOUSING AND COMMUNITY DEVELOPMENT AMENDMENTS OF 1979

Sec. 211(a) Section 9(a) of the United States Housing Act of 1937 is amended--

(1) by inserting "(1)" after "(a)";

(2) by striking out "(1)" and "(2)" in the second sentence and inserting in lieu thereof "(A)" and "(B)";

(3) by inserting the following before the period at the end of the third sentence: ", and such contract shall provide that no disposition of the low-income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary"; and. . . .

42 U.S.C. §1437g(a)(1) [After 1979] Annual contributions for operation of lower-income housing projects (a) determination of amounts; contract authorization, standards of payments.

In addition to the contributions authorized to be made for the purposes specified in section 1437c of this title, the Secretary may make annual contributions to public housing agencies for the operation of lower income housing projects. The contributions payable annually under this section shall not exceed the amounts which the Secretary determines are required (A) to assure the lower income character of the projects involved, (B) to achieve and maintain adequate

operating services and reserve funds and (C) with respect to housing projects developed under the Indian and Alaskan Native housing program assisted under this chapter, to provide funds (in addition to any other operating costs contributions approved by the Secretary under this section) as determined by the Secretary to be required to cover the administrative costs to an Indian housing authority during the development period of a project approved pursuant to section 1437c of this title and until such time as the project is occupied. The Secretary shall embody provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds, and such contract shall provide that no disposition of the lower income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary. For purposes of making payments under this section, the Secretary shall establish standards for costs of operation and reasonable projections of income, taking into account the character and location of the project and characteristics of the families served,

or the costs of providing comparable services as determined in accordance with criteria or a formula representing the operations of a prototype well-managed project.

REGULATION

24 C.F.R. §869.105(a). Extension of ACC upon Payment of Operating Subsidy.

(a) ACC Amendment. As a condition for the first HUD approval for payment of Operating Subsidy with respect to the projects under a particular ACC for a PHA fiscal year beginning after the effective date of this Part, the PHA and HUD shall enter into an amendment to the ACC for all projects under the ACC. This ACC amendment shall provide that the ACC provisions related to project operation shall continue in effect with respect to each project under the ACC for a period of 10 years after the end of the last PHA fiscal year for which Operating Subsidy is paid with respect to the project.

No. 83-90

In the Supreme Court of the United States

OCTOBER TERM, 1983

PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY,
PETITIONER

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT S. GREENSPAN
FREDDI LIPSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERSHON M. RATNER
Associate General Counsel for Litigation

HOWARD M. SCHMELTZER
Special Assistant

SUZANNE CURT
Attorney

Department of Housing and Urban Development
Washington, D.C. 20410

QUESTION PRESENTED

Whether the court of appeals correctly concluded that jurisdiction over this suit seeking operating subsidies, in excess of $10,000, pursuant to a contract between petitioner and the Department of Housing and Urban Development lies exclusively in the United States Claims Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Statutes and regulation:

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 706 F.2d 471. The opinion and order of the district court (Pet. App. B1-B54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1983 (Pet. App. A2). A petition for rehearing was denied on June 20, 1983 (Pet. App. A22-A23). The petition for a writ of certiorari was filed on July 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, as amended, provides in pertinent part:

1346(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

1491 The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

42 U.S.C. 1404a provides in pertinent part:

The United States Housing Authority may sue and be sued only with respect to its functions under this chapter, and sections 1501 to 1505 of this title.

STATEMENT

1. Petitioner Portsmouth Redevelopment and Housing Authority (PRHA) is a public housing authority that operates six low income housing projects in Portsmouth, Virginia. PRHA receives debt service subsidies and operating

subsidies pursuant to provisions of the United States Housing Act of 1937, 42 U.S.C. (& Supp. V) 1437c(a) and 1437g, and a consolidated annual contributions contract (ACC) with the Department of Housing and Urban Development (HUD).

When PRHA entered into the ACC in 1976, 42 U.S.C. 1437g provided in pertinent part: "The Secretary shall embody the provisions for such annual contributions [operating subsidies] in a contract guaranteeing their payment subject to the availability of funds." The ACC itself embodies this statutory provision.[1] In 1979, Congress amended that provision by adding to the above-quoted sentence the following clause: "and such contract shall provide that no disposition of the lower income housing project, with respect to which the contract is entered into, shall occur during and for ten years after the period when contributions were made pursuant to such contract unless approved by the Secretary." 42 U.S.C. (Supp. V) 1437g(a)(1). The Secretary implemented the amendment by issuing a regulation requiring amendments to all ACCs embodying the housing authority's agreement to continue operating its low income housing after it stops receiving federal subsidies. 24 C.F.R. 869.105. PRHA refused to execute the amendment to its ACC, and HUD began withholding operating subsidies. See Pet. App. B2-B3; B25-B31. HUD also declined to consider PRHA's application for modernization funds under 42 U.S.C. (Supp. V) 1437*l* because PRHA failed to sign the amendment to its ACC. See Pet. App. B31-B33.

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[1] Paragraph 415(D) of the ACC states:

> The Government shall also make Additional Annual Contributions to the Local Authority (a) for each Fiscal Year in an amount which together with all other Operating Receipts of the Projects will be sufficient to pay the Operating expenditures of such Projects in accordance with the Operating Budgets for such projects as approved by the Government * * *.

2. PRHA filed suit in the United States District Court for the Eastern District of Virginia seeking to compel HUD to release the withheld operating subsidies pursuant to the ACC. PRHA sought to recover more than $676,000 in withheld funds. It also sought an order requiring HUD to consider its application for modernization funds without regard to whether PRHA had signed the required amendment to the ACC.

Ruling on cross motions for summary judgment, the district court first rejected HUD's contention that exclusive jurisdiction over this contract action was in the United States Claims Court, holding that it had federal question jurisdiction under 28 U.S.C. (& Supp. V) 1331 (Pet. App. B7-B17). The district court also concluded that 42 U.S.C. 1404a waived HUD's sovereign immunity and therefore that PRHA was entitled to pursue its claim (Pet. App. B11-B12). On the merits, the court held that HUD could not apply the statutory amendment to 42 U.S.C. (& Supp. V) 1437g and its implementing regulation to PRHA's existing ACC or to its application for modernization funds, and it permanently enjoined HUD from doing so (Pet. App. B33-B54).

3. The court of appeals agreed that 42 U.S.C. 1404a waived HUD's sovereign immunity (Pet. App. A20). The court held, however, that exclusive jurisdiction over the action lay in the United States Claims Court. The court of appeals therefore vacated the district court's judgment and remanded with instructions to transfer the case to the Claims Court (*id.* at A1-A21).

The court of appeals explained that PRHA's lawsuit satisfies all the criteria needed to vest subject matter jurisdiction exclusively in the Claims Court under the Tucker Act, 28 U.S.C. (& Supp. V) 1346(a)(2). First, the claim is asserted against a federal agency and its officials for acts performed in their official capacity, and any judgment

recovered would expend itself on the federal Treasury (Pet. App. A10-A11). Second, the recovery sought plainly exceeds $10,000 (*id.* at A11-A12). Third, the claim is primarily founded on a contract with the government (*id.* at A14-A16) and, in any event, the Tucker Act confers jurisdiction on the Claims Court to consider claims founded on the Constitution or federal statutes (*id.* at A16).

The court of appeals further held that jurisdiction in the Claims Court was not defeated because the complaint also seeks declaratory and injunctive relief. The court explained that "framing an essentially monetary claim in injunctive or declaratory terms" does not affect Claims Court jurisdiction (Pet. App. A12, quoting *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 436 (Ct. Cl. 1979)), and, moreover, it stated that the Claims Court can issue declaratory relief that is "tied to and subordinate to a monetary award" (Pet. App. A13, quoting *S.J. Groves & Sons Co.* v. *United States*, 495 F. Supp. 201, 209 (D. Colo. 1980)). Finally, the court rejected PRHA's argument that 42 U.S.C. 1404a, establishing that the United States Housing Authority may "sue and be sued,"[2] confers subject matter jurisdiction on the district courts to hear such suits (Pet. App. A17-A20).

ARGUMENT

The only issue presented here concerns the appropriate federal forum for this litigation. It is not disputed that sovereign immunity presents no bar to petitioners' lawsuit; the dispute concerns which court has subject matter jurisdiction. Petitioners contend (Pet. 11-29) that jurisdiction lies in the district court; the court of appeals held that exclusive jurisdiction lies in the United States Claims Court because this is a suit "against the United States" within the

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[2]The functions of the United States Housing Authority have been transferred to the Secretary of HUD. 42 U.S.C. 3534.

meaning of the Tucker Act, and the Tucker Act's specific grant of Claims Court jurisdiction prevails over the general grant of federal question jurisdiction in 28 U.S.C. 1331. The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review of the question of the proper forum for this lawsuit is unwarranted.

1. Petitioner does not seriously dispute that the Tucker Act would permit the Claims Court to exercise jurisdiction over this case. There is little question that the three requirements for Tucker Act jurisdiction are satisfied here: PRHA seeks a money judgment in excess of $10,000; the claim is founded upon a government contract or federal law; and the claim is "against the United States" because it is brought against a federal agency based on its actions (see *L'Enfant Plaza Properties, Inc.* v. *United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982); *Breitbeck* v. *United States*, 500 F.2d 556, 558 (Ct. Cl. 1974)). See generally Pet. App. A8-A17.[3] Petitioner instead maintains that the court of appeals erred in finding that Claims Court jurisdiction was *exclusive*, thereby rejecting the argument that either 28 U.S.C. (& Supp. V) 1331 or 42 U.S.C. 1404a confers subject matter jurisdiction on the district court. See Pet. 14-15, 23.

a. The court of appeals correctly held that subject matter jurisdiction exists here only in the Claims Court in spite of the general grant of federal question jurisdiction to the

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[3]Petitioners contend (Pet 16-20) that they do not seek to recover "Treasury funds" because the monies for the operating subsidies have already been appropriated by Congress and have passed into the control of the Secretary. We agree with the court of appeals that these annually appropriated funds are still "Treasury funds" (see Pet. App. A11), but this question is not relevant to whether subject matter jurisdiction exists in the Claims Court. Regardless of who has control of the funds when the lawsuit is filed, a suit against a federal agency to recover funds already appropriated by Congress plainly satisfies the Tucker Act requirement of a suit "against the United States."

district courts in 28 U.S.C. (& Supp. V) 1331. The courts of appeals have widely recognized that the Claims Court (or its predecessor, the Court of Claims) has exclusive jurisdiction over contract actions against the United States where the amount in controversy exceeds $10,000 and, therefore, that an action based on a contract may not be pursued under 28 U.S.C. (& Supp. V) 1331, even where the action involves federal statutes or regulations. *Alamo Navajo Bd., Inc.* v. *Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), cert. denied, 456 U.S. 963 (1982); *Lee* v. *Blumenthal*, 588 F.2d 1281, 1282-1283 (9th Cir. 1979); *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 928, 932 (2d Cir. 1978); *American Science & Engineering, Inc.* v. *Califano*, 571 F.2d 58, 62-63 (1st Cir. 1978). See also *Chicago Consortium, Inc.* v. *Brennan*, 599 F.2d 138, 141 (7th Cir. 1979); *International Engineering Co.* v. *Richardson*, 512 F.2d 573, 577 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976).

Moreover, even if this suit is treated as one arising under the Constitution, federal statutes, or regulations, rather than as a contract action, it has been held that the more specific grant of jurisdiction in the Tucker Act for suits over $10,000, where applicable, prevails over the general grant in Section 1331. See *Keller* v. *MSPB*, 679 F.2d 220, 222 (11th Cir. 1982); *Graham* v. *Henegar*, 640 F.2d 732, 734-735 (5th Cir. 1981); *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081, 1087-1088 (6th Cir. 1978). Otherwise, the exclusive jurisdiction of the Claims Court would be largely destroyed because most cases falling within its jurisdiction could also be brought within the general terms of Section 1331. See *Graham* v. *Henegar*, 640 F.2d at 734. Indeed, the distinction deliberately drawn by Congress in the Tucker Act between suits for greater than or less than $10,000 would be obliterated. Accordingly, there is no basis here for Section 1331 jurisdiction in the district court.

Petitioner also objects (Pet. 20-22) that Claims Court jurisdiction is improper because of the declaratory and injunctive relief sought. However, as the court of appeals found (Pet. App. A12-A14), the essence of this action is the disgorgement of withheld operating subsidies claimed to be due under petitioner's contract with HUD,[4] and hence the lawsuit belongs in the Claims Court. The jurisdiction of the Claims Court cannot be avoided by masking a monetary claim as one for equitable relief. See, *e.g.*, *B.K. Instrument, Inc.* v. *United States*, No. 83-6124 (2d Cir. Aug. 4, 1983), slip op. 28. Petitioner suffers no deprivation of rights by being routed to the Claims Court to pursue its action; that court is empowered to award declaratory relief that is "tied and subordinate to a monetary award." *Austin* v. *United States*, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975). See *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10. n.15.

b. Petitioner contends (Pet. 14-15) that 42 U.S.C. 1404a itself confers subject matter jurisdiction on the district courts. This contention finds no support in the language of the statute, and petitioner cites no case in which 42 U.S.C. 1404a has been held to permit a suit for damages against the United States in district court. Instead, petitioner relies (Pet. 24-25) on cases involving the National Housing Act, 12 U.S.C. 1702, which provides in relevant part that the Secretary may "sue and be sued *in any court of competent jurisdiction, State or Federal*" (emphasis added).[5] As the court of appeals recognized in distinguishing its own precedent under Section 1702 (Pet. App. A18-A20), these cases

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[4]Indeed, petitioner sought relief other than money damages only after it amended its complaint. See Pet. 8.

[5]Petitioner also relies on one case, *Mar* v. *Kleppe*, 520 F.2d 867 (10th Cir. 1975), involving a suit against the Small Business Administration under 15 U.S.C. 634, which contains the same language as 12 U.S.C. 1702.

are manifestly inapposite because the language of that statute is so different from the language involved here that decisions under Section 1702 have little bearing on the question of jurisdiction under Section 1404a. Plainly, Section 1702, by authorizing suit "in any court of competent jurisdiction, State or Federal," provides a basis for district court jurisdiction that is absent here. See *A.L. Rowan & Son* v. *Department of Housing & Urban Development*, 611 F.2d 997, 1000-1001 n.3 (5th Cir. 1980).[6]

2. Petitioner's contention (Pet. 11-20) that the decision below conflicts with decisions of this Court is without merit. The cases relied upon by petitioner considered only the question whether the government had waived sovereign immunity, not which court had subject matter jurisdiction over the action. *Keifer & Keifer* v. *RFC*, 306 U.S. 381 (1939), and *RFC* v. *Menihan Corp.*, 312 U.S. 81 (1941), concerned the scope of the waiver of sovereign immunity of

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[6]There is a sound policy justification for this difference between 42 U.S.C. 1404a and 12 U.S.C. 1702. Programs under the National Housing Act involve HUD as an insurer of private initiatives to construct and operate lower income housing. Because the principals are private parties, and may be sued in state courts, the statute provides that the Secretary too may be sued in state court — whether as a necessary party or simply in the interest of judicial economy. Against this background, as the Fourth Circuit held in *Ferguson* v. *Union National Bank*, 126 F.2d 753, 756 (1942), it would be anomalous to allow suit against the Secretary in any state court yet restrict federal suits to the Claims Court. Moreover, unlike the United States Housing Act programs that are federally funded, many National Housing Act programs are funded by self-generated insurance funds that do not originate in the federal Treasury, and thus suits for money judgments commenced under 12 U.S.C. 1702 would not necessarily expend themselves on the public fisc. Indeed, the courts generally have held that Section 1702 constitutes a waiver of sovereign immunity at all only for actions where the money judgment would be satisfied out of a separate fund, not out of the Treasury. Compare *Lomas & Nettleton Co.* v. *Pierce*, 636 F.2d 971, 973 (5th Cir. 1971), and *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979), with *S.S. Silberblatt* v. *East Harlem Pilot Block*, 608 F.2d 28 (2d Cir. 1979).

a governmental corporation, the Reconstruction Finance Corporation. *FHA* v. *Burr*, 309 U.S. 242 (1940), concerned whether the waiver of sovereign immunity under 12 U.S.C. 1702, which, as discussed above, has little relevance to this case, authorized garnishment of an employee's wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT S. GREENSPAN
FREDDI LIPSTEIN
Attorneys

GERSHON M. RATNER
Associate General Counsel
for Litigation

HOWARD M. SCHMELTZER
Special Assistant

SUZANNE CURT
Attorney
Department of Housing and
Urban Development

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